IN THE

Supreme Court of the United States

October Term, 1955.

No. 621.

MARTHA C. REED,
Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTION PRESENTED.

Is a file clerk entitled to maintain an action for personal injuries under the provisions of the Federal Employers' Liability Act when it appears that her sole duty on behalf of her employer, an interstate railroad, was to carry tracings of railroad equipment between file cabinets and a blueprinting room on the same floor of the employer's office building?

STATEMENT OF THE CASE.

This was an action for personal injuries brought under the Federal Employers' Liability Act. The pleadings consisted of a complaint and an answer, which admitted that respondent was engaged in interstate commerce and that petitioner was its employee, but denied that petitioner was engaged in interstate commerce. After filing its answer respondent took petitioner's deposition and answered interrogatories propounded by petitioner.

Chief Judge Kirkpatrick (United States District Court, Eastern District of Pennsylvania) granted respondent's motion to dismiss on the ground that petitioner's deposition and respondent's answers to interrogatories established that petitioner was not furthering interstate commerce or directly or closely and substantially affecting such commerce and that, therefore, her claim was not within the provisions of the Federal Employers' Liability Act. From the order of dismissal, petitioner appealed to the United States Court of Appeals for the Third Circuit which, in an opinion written by Judge Goodrich, affirmed the decision of the District Court. Chief Judge Biggs dissented on the ground that, although "such a result may be unfortunate", Congress, in adopting the 1939 Amendment, apparently intended to bring most railroad employees within the scope of the Act.

In her deposition, petitioner stated that the accident occurred during her lunch hour on July 19, 1951, when a wind and hail storm blew in a window and she was cut on the right arm (30a-35a).

She testified that for eight or nine years her job classification had been "print maker", her duties had been what she would call those of "a file clerk" and her work consisted exclusively of "filing" transparent prints in the office of the Mechanical Engineer on the fifth floor of respondent's 32nd Street Building in Philadelphia (22a, 23a,

24a). In elaborating upon the details of her job she described it as follows: she was handed an order to remove certain numbered papers from a filing cabinet; she removed the needed tracings from the file and gave them to a man in the blueprint department; when he completed his use of those papers he returned them to her and she replaced them in the file cabinet; these were her only duties (23a, 27a, 28a, 29a, 30a, 54a).

The work of the department of the Mechanical Engineer included the preparation of blueprints from tracings of equipment used on all parts of respondent's railroad. The tracings were kept on file in that department and the blueprints made from the tracings were sent to all states through which the railroad operated its interstate system (19a, 20a, 23a, 27a, 29a). However, petitioner had nothing whatever to do with the preparation of the prints nor with their distribution to other parts of the railroad system (54a).

ARGUMENT.

A. Introduction.

The reasons which have been cited by petitioner in support of the petition for granting of certiorari in this case are not valid. There is no conflict between the decision of the Court below and those of this Court, the other Circuits or the State courts, and there is no compelling reason why this Court should pass upon the question of whether a file clerk is entitled to maintain an action under the Federal Employers' Liability Act.[1] Since its adoption, the Act has been interpreted as providing a remedy for railroad employees engaged in interstate transportation.[2] Petitioner contends, however, that following the 1939 Amendment[3] the remedy became available to any employee regardless of the nature of his work, provided only that his duties have some eventual effect on the interstate business of the carrier. It is submitted that in rejecting that contention, the Court of Appeals did no more than apply a well-established interpretation of the Act to the facts in the case at bar and that the decisions on which petitioner relies are consistent with the ruling of the Third Circuit in this case.

The applicability of the Act to a particular employee is governed by Section 1. That section is composed of two paragraphs, the first being enacted in 1908 and reenacted in 1939 and the second being added by the 1939 Amendment. Eliminating non-essentials, the section reads as follows:

> "Every common carrier by railroad while engaging in (interstate) commerce . . . shall be liable in damages to any person suffering injury while he is

1. Act of April 22, 1908, c. 149, 35 Stat. 65, 45 U. S. C. § 51.
2. *Shanks v. D., L. & W. Railroad Co.*, 239 U. S. 556 (1916).
3. Act of August 11, 1939, c. 685, 53 Stat. 1404, 45 U. S. C. § 51.

employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of . . . employees of such carrier, or by reason of any defect . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

To obtain a true interpretation of the coverage of the Act requires a review of the scope of the 1908 Act, the language of the 1939 Amendment, the legislative history of the Amendment, and the judicial interpretation of the Act from 1939 to date.

B. The Scope of Applicability of the Employers' Liability Act Prior to the 1939 Amendment.

The framework of the 1908 Act [4] was governed by Congress' determination that it should escape the fate of its predecessor, the first Employers' Liability Act,[5] which was enacted in 1906 and declared unconstitutional by this Court in 1908. The scope of the earlier Act and the reason for its invalidation are summarized in the following sentence from the opinion in *The Employers' Liability Cases*, 207 U. S. 463, 498 (1908):

4. Throughout this brief we are discussing the provisions of Section 1 of the Act which is set forth above. The first paragraph was Section 1 of the Act as originally enacted in 1908. It was reenacted without change in 1939. The second paragraph was added by the 1939 Amendment.

5. Act of June 11, 1906, c. 3073, 34 Stat. 232.

> "The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employés, without qualification or restriction as to the business in which the carriers or their employés may be engaged at the time of injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce."

In the light of that opinion, Congress narrowed the scope of the Act's coverage and in Section 1 expressly limited recovery to injuries suffered by the employee "while he is employed by such carrier in such commerce".

In its interpretation of the 1908 Act, this Court did not undertake to draw a functional line and include within the coverage of the Act those who had interstate duties and exclude those whose duties were intrastate. It approached each case without regard to the essential nature of the duties of the employee who was injured and looked only to the character of the *transportation* in which he was engaged *at the moment of injury.* If the transportation or instrumentality of transportation was interstate at that instant he was covered, if it was not, he was relegated to the compensation laws of the states.[6]

Thus, in the early case of *Pedersen v. D. L. & W.*, 229 U. S. 146 (1913), a carpenter, whose duty it was to repair a bridge which carried interstate traffic, was injured while carrying some bolts and rivets to the bridge. Recovery was based on the fact that the bridge was an "instrumentality of interstate commerce" and the work was "so closely connected therewith as to be a part of it" (page 151).

Thereafter in *Illinois Central v. Behrens*, 233 U. S. 473 (1914), the "moment of injury" test was formulated. The deceased, a member of a switching crew handled interstate and intrastate trains indiscriminately. He was killed

6. *New York Central R. Co. v. Winfield*, 244 U. S. 147 (1917).

while moving an intrastate train and recovery was denied for that reason.

Finally, in *Shanks v. D. L. & W.*, 239 U. S. 556 (1916), the Court made clear that recovery depended on employment in interstate *transportation*, saying at page 558:

> "the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

That test was applied again and again[7] and, after fifteen years, in *C. & N. W. Co. v. Bolle*, 284 U. S. 74 (1931), the Court said at page 79:

> "Since the decision in the Shanks case, the test there laid down has been steadily adhered to, and never intentionally departed from or otherwise stated."

While this Court in its decisions was unwilling "to declare a standard invariable by circumstances or free from confusion . . in application",[8] the result of a long series of cases prior to 1939 was to render reasonably certain the classes of employees who were to be considered within the Act. Three groups were permitted to recover[9] (providing they were engaged in interstate commerce at the moment of injury):

(a) those engaged in train movements (the train crews[10]),

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7. In two cases, *Erie R. Co. v. Collins*, 253 U. S. 77 (1920), and *Erie R. Co. v. Szary*, 253 U. S. 86 (1920), this Court departed from the rule of the *Shanks* case. In *Chicago & E. I. R. Co. v. Commission*, 284 U. S. 296 (1932), those cases were expressly overruled for that reason.

8. *Industrial Accident Commission v. Davis*, 259 U. S. 182, 188 (1922).

9. For a substantially similar classification of the employees within the Act prior to the 1939 Amendment, see Roberts, II *Federal Liabilities of Carriers* (2nd ed. 1929), page 1370.

10. *North Carolina R. Co. v. Zachary*, 232 U. S. 248 (1913); *Louisville & Nashville R. Co. v. Parker*, 242 U. S. 13 (1916).

(b) those whose duties were "connected with that movement, not indirectly or remotely, but directly and immediately" [11] (switchmen,[12] signalmen [13] and yard employees [14]), and

(c) those whose "work of keeping such instrumentalities (of interstate transportation) in a proper state of repair . . . (was) so closely related to such commerce as to be in practice and in legal contemplation a part of it" [15] (maintenance workers [16] and repairmen [17]).

It is apparent that the purpose of the Act was to provide a special remedy for those who were exposed to the hazards of the railroad industry [18] and that the interpreta-

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11. *St. Louis, San Francisco & Texas R. Co. v. Seale*, 229 U. S. 156, 161 (1913); *N. Y. Central R. R. v. Carr*, 238 U. S. 260, 264 (1914); *Erie RR. Co. v. Welsh*, 242 U. S. 303, 306 (1916).

12. *Norfolk & Western R. Co. v. Earnest*, 229 U. S. 114 (1913).

13. *Southern Pacific Co. v. Industrial Accident Commission*, 251 U. S. 259 (1920).

14. *Pecos v. Northern Texas R. Co.*, 240 U. S. 439 (1916).

15. *Pedersen v. D. L. & W. R Co.*, 229 U. S. 146, 151 (1913); *Shanks v. Del. L. & W. R. Co.*, 239 U. S. 556, 558 (1915); *Kinzell v. Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130, 133 (1919); *So. Pacific Co. v. Commission*, 251 U. S. 259, 263 (1910); *Chicago & N. W. Ry Co. v. Bolle*, 284 U. S. 74, 78 (1931); *New York, N. H. & H. R. Co. v. Bezue*, 284 U. S. 415, 420 (1931).

16. *Kinzell v. Chicago, M. & St. P. R. Co.*, 250 U. S. 130 (1919).

17. *Walsh v. N. Y., N. H. & H.*, 223 U. S. 1 (1912).

18. The philosophy underlying the Act was that which had inspired earlier railroad legislation in England, Continental countries and some of the States. See Reports of House Judiciary Committee, dated March 15, 1906, Report No. 2335 (1906 Act), and April 4, 1908, Report No. 1386 (1908 Act). In Report No. 2335 it was said:

> "In 1888 England passed an act which abolished the doctrine of fellow-servant with reference *to the operation of railroad trains*, and in 1897 it extended this law to apply to many of the *hazardous employments of the country*". (Emphasis supplied.)

In reporting on the 1906 Act, Representative Sterling said, 40 Congressional Record 4602:

> "I think it would apply to trainmen, switchmen, men in the roundhouse that have charge of the engines, and any other em-

tion which the court placed upon the Act in the years immediately following its passage supported that construction.[19] Clerical workers were not exposed to the hazards of railroading and this Court clearly recognized that they were not within the scope of the Act.[20]

C. The 1939 Amendment.

The primary objective of the 1939 Amendment according to the legislative history (discussed *infra* page 15) was the complete elimination of the defense of assumption of risk. The secondary purpose, with which we are here concerned, was the abolition of the "moment of injury" rule. An examination of the language of the paragraph which was added to Section 1 by the Amendment shows no intention on the part of Congress to change the scope of the coverage of the Act and thus include any employees within its provisions other than those who were included in the three classes discussed above at pages 7-8. The Amendment merely eliminated the necessity that such employees be engaged in interstate transportation at the very time when the accident occurred.

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ployees whose duty relates to or is connected with the business of carrying commerce; but I do not believe it would go any further than that."

He made a substantially similar report on his presentation of the 1908 Act. A review of the entire legislative history of both Acts and the 1939 Amendment reveals that many examples were given as to the type of employee for whose benefit the legislation was intended. Not one employee is referred to outside the field of those exposed to the hazards peculiar to the operation of a railroad.

19. See particularly *Industrial Com. v. Davis*, 259 U. S. 182, 187 (1921). In cases since the 1939 Amendment the purpose of the Act as it affects those engaged in "railroading" has frequently been recognized. See for example *Bailey v. Central Vermont R. Inc.*, 319 U. S. 350, 354 (1943) and the comments of Mr. Justice Frankfurter in his dissenting opinion in *Stone v. N. Y. C. & St. L. R. Co.*, 344 U. S. 407, 410 (1953).

20. *Industrial Com. v. Davis*, 259 U. S. 182, 187 (1922); *N. Y., N. H. & H. R. Co. v. Bezue*, 284 U. S. 415, 419 (1932).

In the first place, it should be pointed out that the reenactment of the original section carried with it the "gloss of construction" which this Court had placed upon it,[21] and that included the well-established rule that, while couched in terms of "commerce", the Act was intended to deal with employees who were engaged in transportation.[22] An analysis of the provisions of the second and new paragraph shows very clearly that no change was intended by Congress in connection with this basic conception.

Three clauses of the Amendment deal with three classes of employees who are to be granted the benefits of the Act and it will be seen that these are the same three groups which were already within its provisions. The Amendment, however, freed them from the restrictions of the "moment of injury" rule:

> a. "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce";
>
> b. "Any employee of a carrier, any part of whose duties . . . shall, in any way directly . . . affect such commerce as above set forth"; and
>
> c. "Any employee of a carrier, any part of whose duties . . . shall, in any way . . . . closely and substantially, affect such commerce as above set forth . . ."

A review of the line of cases which this Court had decided prior to the Amendment and which had applied the "moment of injury" test makes the purpose of the first clause ("furtherance of interstate or foreign commerce") entirely clear. If, as suggested by Chief Judge Biggs in his dissent to the decision of the Court below, it had been Congress' intention to open the flood gates and bring most

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21. See *Francis et al. v. Southern Pacific Co.*, 333 U. S. 437, 450 (1948), and cases cited by Mr. Justice Frankfurter in *Commissioner v. Estate of Church*, 335 U. S. 632, 690 (1949).

22. *Chicago & N. W. R. Co. v. Bolle*, 284 U. S. 74 (1931).

railroad employees within the scope of the Act,[23] it would have been a simple matter for Congress to say so. There would have been no need to disguise the "furtherance" provision as one concerned with the elimination of the "moment of injury" test. The "directly or closely and substantially" clause would have been without purpose and entirely redundant. Above all, the retention of the language of the original section with the "gloss of construction" it had received from this Court negated the possibility that Congress intended to bring all employees within the Act. We submit that the meaning of the "furtherance" clause is perfectly clear when it is read in its context. "Furtherance" when applied to "transportation" was intended to mean "movement"[24] in the physical sense, and this clause of Section 1 was intended to retain within the scope of the Act all transportation employees regardless of their activities at the moment of injury.

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23. Appendix to Petition for Writ of Certiorari, p. 35.

24. The words "furtherance" and "furthering" were used in that general sense prior to the adoption of the Amendment. Thus in Roberts, II *Federal Liabilities of Carriers* (2nd ed. 1929), it was said at page 1372:

> "a fireman on duty on a train carrying freight from one state into another is engaged in interstate commerce because he is actually furthering the movement of interstate traffic."

at page 1418:

> "For like reasons trainmen on such trains are furthering interstate transportation and hence subject to the federal Employers' Liability Act while picking up, at stations en route, cars to be included in the train and carried forward, regardless of whether such cars are themselves interstate or local in character."

and at page 1432:

> "The rule to be deduced from the foregoing cases would seem to be that if, in connection with a switching operation, any interstate purpose is intended or accomplished, the movement as a whole is in furtherance of interstate transportation; . . ."

See also *Erie Railroad v. Welsh*, 242 U. S. 303, 306 (1916); *Murray v. Pittsburgh Railroad Co.*, 263 Pa. 398, 401, 107 Atl. 21 (1919); *Hines v. Wicks*, 220 S. W. 581 (Tex. App., 1920).

This interpretation is supported by the wording of the second and third provisions. The second provides for those employees "any part of whose duties . . . shall, in any way directly . . . affect such commerce as above set forth". As pointed out above, the decisions of this Court prior to the Amendment did not confine recovery to those who were actively moving trains in interstate transportation. It also included those whose duties were "connected with that movement, not indirectly or remotely, but *directly* and immediately"[25] (emphasis supplied)—these being, in general, the switchmen, signalmen, yard and station personnel. The "directly" clause was obviously intended to apply to that group and to prevent them from losing the benefit of the Act if the transportation with which they were concerned at the moment of injury should turn out to be intrastate.

The third group of employees referred to in the Amendment consists of those "any part of whose duties . . . shall, in any way . . . closely and substantially, affect such commerce as above set forth". It is again apparent that in this clause Congress intended to eliminate the application of the "moment of injury" rule to the maintenance workers and repairmen, the third group of personnel who were covered by the Act before the Amendment. These had been included since they were among those whose "work of keeping . . . instrumentalities of interstate transportation in a proper state of repair . . . (was) so closely related to such commerce as to be in practice and in legal contemplation a part of it".[26] Such employees are further away from transportation than the train crews and the track and yard personnel of the first and second groups but closer to it than those whose duties are purely local or intrastate in character or do not involve any interstate activity whatever. Again we stress the fact that

25. *St. Louis, San Francisco Ry. v. Seale*, 229 U. S. 156, 161 (1913).

26. *Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146, 151 (1913).

the phrase "such commerce as above set forth" ties the employees into interstate transportation in view of this Court's long-standing definition of the term "commerce" in the first and reenacted paragraph. In view of the necessary implications of the phrases "closely and substantially" and "such commerce", it would be difficult to make a serious contention that this clause could bring clerical employees who work in an office building within the provisions of the Act.

To summarize: the reenactment of the first paragraph of Section 1 and the context of the second paragraph permit only one explanation of the congressional purpose. The "moment of injury" rule was intended to be eliminated with reference to all classes of employees who, under the decisions of this Court interpreting the Act, had been included within its provisions. Thus the three groups which fell within the earlier rulings were covered in the following manner:

> a. within the "furtherance" of transportation clause, those actively engaged in moving the equipment of transportation;
>
> b. within the "directly" clause, the non-operating personnel who are immediately concerned with transportation; and
>
> c. within the "closely and substantially" clause the non-operating personnel who keep the instrumentalities of transportation—trains, track and roadbed—maintained and in repair.[27]

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27. Most of the cases decided after the passage of the 1939 Amendment, some of which contain language to the effect that the Amendment was intended to "broaden" the coverage of the Act a[nd] bring in employees not previously within its provisions, are entirely consistent with the interpretation set forth above. It should be remembered that the "moment of injury" rule eliminated two groups of employees: those who were generally engaged in interstate commerce but in intrastate at the time of the accident and those who performed work on equipment which was normally used in interstate

Transportation is the center of three concentric circles surrounding, respectively, each of the three groups. The second clause and its circle (yard men) are further from transportation than the first circle (the crews of the trains). The third circle (maintenance and repairmen) is still further removed from transportation than is the second. To give the "furtherance" clause a broader circle than the other two does violence not only to the first paragraph of the Section with its "gloss of construction" but to the whole context of the 1939 Amendment as well. It would make the Amendment read as though it said that in addition to the transportation employees who are brought within the Act by the provisions of the first paragraph, all other employees will be covered by the Act, *and then in addition* there will also be included those whose duties are closely related to transportation.

D. Guides to Interpretation of the Amendment.

There are two sources outside the language of the Act itself which throw considerable light on the congressional

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commerce but which had been withdrawn from such commerce at the time of the injury. *Illinois Central R. Co. v. Behrens*, 233 U. S. 473 (1914), in which a member of a switching crew happened to be moving intrastate cars when he was killed, illustrates the first group; *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353 (1917), in which plaintiff was injured while repairing a locomotive used in interstate commerce both before and after the accident, is an example of the second. Obviously, the scope of the coverage of the Act was very materially widened when these employees were brought within the Act.

See *Baird v. N. Y. C. R. Co.*, 229 N. Y. 213, 86 N. E. 2d 567 (1949), in which the Court said at page 569:

> "But the new 1939 language cannot, of course, be read off by itself. We know from the decisions above cited and many others, that the amendment was enacted in the light of two limiting rules of the cases: one, the so-called 'pin-point rule' forbidding recovery unless the work was interstate transportation or very closely connected therewith at the very time of the accident, and, second, the so-called 'back shop' rule which said that 'dead engines' in the course of repair were not instrumentalities of interstate transportation."

intention as expressed therein and support the contention that the sole purpose of the Amendment of Section 1 of the Act was the elimination of the "moment of injury" rule. One is the legislative history of the Act,[28] the other a comparison of the wording of the Amendment with contemporary federal legislation in which Congress sought to exercise its fullest power of regulation within the provisions of the commerce clause.

1) *The Legislative History.*

It has already been pointed out that when the 1906 and 1908 Acts were in the legislative process the Congressional Record indicates that Congress was primarily concerned with providing an effective remedy for those who sustained injuries because of their exposure to the peculiar hazards which are faced by transportation employees.[29] The legislative history of the 1939 Amendment shows that that same concern was again the dominant factor.

At the hearings of the Subcommittee of the Committee on the Judiciary of the Senate, 76th Congress, 1st Session, § 1708, March 28-29, 1939, T. J. McGrath, General Counsel for the Brotherhood of Railroad Trainmen, who was the principal witness to advocate the adoption of the Amendment, made it clear that it was not intended to go beyond the transportation employees already covered by the Act. He said, at pages 4 and 8:

> "The amendment of 1908 was intended to and did restrict the application of the act to employees of common carriers by railroad who were injured while the employees themselves were engaged in interstate commerce. The Court, in interpreting that section, clarified it to that extent, and perhaps it might be said they

28. *Steiner et al. v. Mitchell*, No. 22 October Term, 1955, decided by this Court January 30, 1956, 24 LW 4081.

29. See footnote 18, *supra*, page 8.

limited its application by *defining interstate commerce as being transportation in interstate commerce, so that the law really applies to train and enginemen and to other employees whose work is incidental to that sort of thing, men working in roundhouses, loading cars in interstate commerce, and so forth.*

* * * *

"Now if this amendment that we propose is put into the act it will, to a very large extent, wipe out the obscurity and the difficulty that now exists in attempting to determine when a man is or is not engaged in interstate commerce. *Its application will be confined, of course, to the character of employees now covered by the present act . . .*" (Emphasis supplied.)

The details of Senate Report No. 661, 76th Congress, First Session, June 22, 1939 (pp. 2-3) illustrate quite clearly that the broadened scope of coverage was intended to eliminate only the "moment of injury" test in both its troublesome aspects; i.e., what was the injured employee doing or for what purpose was the equipment on which he was working being used at the instant of his injury:[30]

"In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.

* * *

"Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and

30. See footnote 27, *supra*, page 13.

which were, just before or just after the injury, used in such commerce.

* * *

"The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic."

Furthermore, prior to the passage of the Senate bill changes were made in its text which had the effect of narrowing the coverage of the Act and preventing it from being interpreted along the line advocated by the petitioner in this case.

Thus the first version of the Senate bill provided that the Act would apply to employees, any part of whose duty was the furtherance of interstate commerce or in any way affected interstate commerce. Thereafter, the Senate added the more restricted language "in any way directly or closely and substantially". A provision for the inclusion of "any employee . . . whose duties . . . shall be in any degree incidental" to interstate commerce was eliminated from the final bill. This Court has, on a number of occasions, given weight to deliberate changes that have been made during the course of the legislative process.[31] We submit that petitioner's argument is aimed at persuading the Court to interpret the Act as though it embodied the provisions of the bill in its early stages rather than those of the final enactment.

The legislative discussion of the 1939 Amendment in the House concerned itself with the problem of assumption of risk and no reference is made in the report to the question of coverage. This, in itself, indicates that the employees under consideration were those who were engaged

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31. See *Western U. T. Co. v. Lenroot*, 323 U. S. 490, 509 (1945).

in transportation or close to the instrumentalities of transportation. In the Report of the House of Representatives, Committee on Judiciary, 76th Congress, First Session, Report No. 1222 on H. R. 4988, referring to the assumption of risk provision, it is said (p. 5):

> "Manifestly, all that is sought to be done is to prevent the master from embarking upon a practice of negligence *with respect to the physical conditions upon and along the right-of-way.*" (Emphasis supplied.)

After the two houses of Congress had disagreed as to the exact terms of the Amendment a committee of conference met and recommended its adoption in the form in which it now stands. In relation to the coverage of the Act, their *entire* report is as follows (84 Congressional Record 11107):

> "The conferees agreed to a Senate provision not contained in the House amendment, *which is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.*
>
> "The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, 'in transportation or work so closely related to it as to be practically a part of it' (Shanks v. D. L. & W. R. R.)." (Emphasis supplied.)

2) *Comparison With Contemporary Legislation Involving the Commerce Power.*

This Court noted, prior to the adoption of the 1939 Amendment, that the Employers' Liability Act did not exhaust the limits of the congressional power under the commerce clause.[32] It seems equally clear that it was not the intention of Congress at the time of the Amendment to reach out to the limits of its power.

By 1939, decisions of this Court had made it relatively clear that the regulatory power of Congress under the commerce clause could embrace within it all the employees of employers who were engaged in interstate commerce regardless of the nature of the duties of the employee. In the National Labor Relations Act, Congress clearly expressed an intention to bring many employees formerly considered to be in intrastate commerce within the provisions of the Act and this Court sustained its action.[33]

That Congress was aware of its broad power to control interstate commerce and knew how to encompass a very wide area of employees when it was its intention to do so is also made evident by the Fair Labor Standards Act.[34]

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32. *Illinois Central R. Co. v. Behrens*, 233 U. S. 473, 477 (1914).

33. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). The National Labor Relations Act, Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, empowered the NLRB to prevent any person from engaging in any unfair labor practice "affecting commerce".

34. The Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, set forth the following definitions:

> "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." 29 U. S. C. § 203(b).
>
> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods or in any process or occupation necessary to the production thereof, in any State." 29 U. S. C. § 203(j).

When it came to the 1939 Amendment of the F. E. L. A., Congress failed to indicate that all the employees of an interstate carrier, whether engaged in transportation or not, were intended to be made subject to the Act in order to accomplish its purpose. It likewise failed to define "commerce" in broader terms than "transportation" or to give any other indication that it intended to legislate to the limit of its power under the commerce clause. It thereby precluded a valid contention that it intended that employees whose duties were local in character and not connected with interstate transportation were brought within the coverage of the Act.

E. The Federal and State Decisions Under the Amendment.

The cases which have been decided since 1939 are in general harmony with an interpretation which credits the Amendment of Section 1 with no greater impact on the coverage of the Act than the elimination of the "moment of injury" rule. No cases have permitted a recovery if the employee did not fall within the three classes to which the Act had been applied prior to the Amendment, except the *Southern Pacific Co.* cases[35] now pending before this Court. A few cases have suggested that the language of the Amendment has broadened the Act's coverage beyond the mere elimination of the "moment of injury" rule but the pronouncements to that effect appear to be purely dicta. In the absence of any problem of the injured man's duties at the moment of the accident, the various types of railroad employees fared no differently before the Amendment than since in so far as coverage was concerned.

The only cases decided since the 1939 Amendment which have ignored the test of relationship to transporta-

35. *Southern Pacific Company v. Gileo; Southern Pacific Company v. Moreno; Southern Pacific Company v. Aranda; Southern Pacific Company v. Eufrazia; Southern Pacific Company v. Eelk*, certiorari granted Oct. 10, 1955, Docket No. 257.

tion are the five *Southern Pacific Co.* cases [36] in which this Court recently granted certiorari. These cases involved the construction of wheels, cars or yard retarders, which were instrumentalities of transportation even though not yet in transportation itself. The Supreme Court of California made no effort to explain why the *White* [37] and *Raymond* [38] cases were not controlling other than to refer to the "broad language added by the amendment in 1939". The rulings in the California cases have no real bearing on the case at bar since they merely involve the question of whether the "new construction doctrine" is still valid in cases arising under the F. E. L. A. They do not constitute a valid reason for the granting of certiorari in this case, as urged by petitioner in the first reason for granting the writ.[39]

But, parenthetically, we contend that the California cases were not correctly decided. As noted above,[40] the legislative history of the 1906 and 1908 Acts indicates that the proponent of the legislation did not believe that the Act would extend to shop employees. In several cases prior to 1939, this Court expressed its belief that shopmen were not within the provisions of the Act.[41] Such employees were

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36. See footnote 35, *supra*, p. 20.

37. *New York Central Railroad Co. v. White*, 243 U. S. 188 (1917).

38. *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U. S. 43 (1917).

39. Petitioner's brief, page 5.

40. See footnote 18, *supra*, p. 8.

41. In *Industrial Commission v. Davis*, 259 U. S. 182 (1922); the Court said at page 187:

> "Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement, indeed, are necessary to it, but so are all attached to the railroad company, official, clerical or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation

normally far removed from transportation and it was arguable whether they were exposed to the hazards of railroading.[42] The Court had ruled at an early stage, however, that those who worked to keep instrumentalities of transportation in repair were within the Act,[43] and a locomotive which was being serviced or repaired in a roundhouse or shop was an instrumentality that was quite as important to transportation as a bridge over the tracks. Consequently, when the Court dealt with the repair of locomotives, it barred recovery not because shopmen were not closely related to transportation but because *at the moment of injury* the engine was out of interstate service.[44] In the light of that background, the courts had no difficulty in concluding, after the Amendment, that shop repairmen were within the coverage of the Act.[45]

It is quite a different matter, however, to contend that employees who are engaged in shops devoted to new construction are within the Act. Prior to the Amendment, such employees had been ruled out, not because of the fact that the instrumentalities were not in interstate service at the time of the accident but because they were not instrumentalities of transportation at all.[46] Concepts of what is commerce and what affects commerce have doubtless changed since the decision in the *White* and *Raymond* cases, and in 1939 Congress might well have brought within the Act railroad employees engaged in manufacture. The defi-

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of the instrumentalities for a distinction between commerce and no commerce."

And see *N. Y., N. H. & H. R. Co. v. Bezue*, 284 U. S. 415, 419 (1932).

42. Of course, it can be said that when locomotives and cars are moved in and out of the shops for repairs, they move on tracks and the shop employees face the same risk of injury as do switchmen, for example.

43. *Pedersen v. D. L. & W.*, 229 U. S. 146 (1913).

44. *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353 (1917).

45. *Edwards v. B. & O. R. Co.*, 131 F. 2d 366 (7th Cir. 1942).

46. *New York Central Railroad Co. v. White*, 243 U. S. 188 (1917); *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U. S. 43 (1917).

nition of "produced" in the F. L. S. A.[47] presented one simple method of doing so. No such intention can be read into the language of the Amendment and its legislative history definitely rules it out. With all deference, we submit that the decisions of the Supreme Court of California in the backshop cases were based upon a misunderstanding of the scope of the Act and consequently amount to judicial legislation.

The case of *Lillie v. Thompson*, 332 U. S. 459 (1947), relied upon by petitioner in its second reason,[48] does not sustain the petition. In the first place, the Court did not pass on the issue of coverage;[49] and, secondly, her duties were "to receive and deliver messages to men operating trains in the yards" (page 461). That case graphically illustrates the difference between coverage and non-coverage by the Act. Lillie worked in direct contact with trains traveling on tracks; Mrs. Reed, petitioner in the case at bar, worked in an office building.

The petitioner's third reason[50] was an alleged conflict between the decision of the Third Circuit in the case at bar and *Straub v. Reading Co.*, 220 F. 2d 177 (3rd Cir. 1955). In *Straub*, the timekeeper's duties brought him on occasion to the cabs of the locomotives and he traveled from state to state. The necessary relationship to transportation was present though the Court labeled it a "borderline case", presumably because the claimant was a white collar worker with an office well away from the tracks.

The fourth reason[51] was a conflict between the decision below and *Thomas v. Union R. Co.*, 216 F. 2d 18 (6th Cir. 1954). The question of whether the plaintiff was within the F. E. L. A. does not appear to have been raised in the *Thomas* case and was not mentioned in the opinion. While petitioner apparently assumes that the plaintiff was a white

47. Quoted in footnote 34, *supra*, page 19.
48. Petitioner's brief, page 5.
49. See footnote to the decision at page 460.
50. Petitioner's brief, page 5.
51. Petitioner's brief, page 5.

collar worker, all that appears in the opinion was that plaintiff, a railroad employee, fell while "leaving his office and stepping from the porch thereof onto the concrete floor of a roundhouse" and that there was evidence of a dangerous condition "near the foreman's office, in the roundhouse" (page 19). On that meager information it would appear that Thomas' duties kept him in close proximity to the instrumentalities of transportation and that he was therefore within the coverage of the Act.

The fifth reason[52] cited three state cases involving claimants whose duties bear no close comparison with petitioner's. In *Ericksen*[53] plaintiff was a lumber inspector, whose job was to inspect lumber on the premises of lumber companies and accept or reject them for interstate shipment to the defendant. He was injured while inspecting ties that were being loaded into defendant's freight car standing alongside a dock. Plaintiff himself crossed state lines while performing his duties, as did the ties themselves. Ties are, of course, as much instrumentalities of transportation as rails, roadbeds and bridges. The *Harris*[54] case involved a shop employee who, among other things, took care of fires and firepans on locomotives engaged in interstate commerce and loaded oil for use on those locomotives. In *Jordan*[55] the injured employee had been, for many years, a carpenter whose work included the repair of bridges, water tanks, coal houses and stations. At the time of his injury he was enlarging a sewer used to carry off ashes, water and grease from pits in a roundhouse where interstate engines were serviced.

More in point is the decision of Judge Yankwich in *Holl v. Southern Pac. Co.*, 71 F. Supp. 21 (N. D. Cal. 1947),

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52. Petitioner's brief, page 6.

53. *Ericksen v. Southern Pacific Co.*, 39 Calif. 2d 374, 246 P. 2d 642 (1952), cert. denied, 344 U. S. 897 (1952).

54. *Harris v. Missouri Pac. R.*, 158 Kan. 679, 149 P. 2d 342 (1944).

55. *Jordan v. Baltimore and Ohio Railroad Company*, 135 W. Va. 183, 62 S. E. 2d 806 (1950).

in which the Court denied coverage to a clerk in a freight claim department. The Court there said at pages 23-24:

> "If she comes under the Act, so does the typist to whom she furnished the list of carriers, and the office boy who may have acted as messenger between the two. And so, for that matter, does every other clerical employee in the department. I do not think that it was the intention of the Congress to include such employees and to withdraw them from the protection of State Employers' Liability Laws. On the contrary, I am of the view that *had Congress intended to include them, it would have amended the first part of Section 51 by omitting the words 'in such commerce'*. This would have extended the Act to 'any person suffering injury while he is employed by such carrier,' and would have placed *all employees of interstate railroads under the Act*, whether their work be clerical or not, or in any way connected with the interstate commerce or not. It would have made the sole test *the interstate nature of the business of the carrier*. This it could have done constitutionally even if it had included employees and activities clearly local and intrastate. [Citing cases].
>
> "But the Congress did not do so. And I do not find in the cases which have arisen under the amendment any judicial sanction for doing it by interpretation." (Emphasis by the Court.)

CONCLUSION.

There is no basis for the granting of the petition for certiorari in this case and the writ should be denied.

Respectfully submitted,

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